No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-profit organization,

Appellee.

APPELLANT'S OPENING BRIEF.

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I. STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

This is an appeal from a judgment, of the United States District Court for the Southern Division of the Northern District of California, in favor of the defendant in an action for declaratory relief arising out of the construction of a provision in a lease between appellant as lessor and appellee as lessee.

The original complaint was filed in the Superior Court of the State of California in and for the City and County of San Francisco on June 17, 1946, and thereafter, pursuant to stipulation of the parties and proceedings to that end duly had and taken, said cause was removed to said United States District

Court and the papers were duly filed in said Court on July 2, 1946. (Tr. pp. 2-5.) The basis of the jurisdiction of the District Court in said matter is predicated upon diversity of citizenship, alleged in the complaint (Tr. p. 2), and the answer (Tr. p. 8) as provided by Title 28 U.S.C.A., Section 71.

Sections 225 and 861a of Title 28 U.S.C.A. vest in Circuit Courts of Appeals appellate jurisdiction in judgments of the character involved herein.

II. STATEMENT OF FACTS.

The general outline of the facts is presented very clearly in the pleadings and in the opinion of the Court below. The record shows that appellant leased to appellee certain premises in San Francisco for a period commencing September 15, 1943, and extending for a period of six months from and after the cessation of hostilities in the present war with Japan. (Tr. p. 3.) The appellee pleads as a defense the investment of some $30,000.00 in improvements, and also that the termination of the lease could only be accomplished by political action of the nations involved, and not by the cessation of actual warfare. The testimony shows that there was no discussion whatsoever by any of the parties as to their understanding or interpretation of the language used. (Tr. pp. 49, 53, 54, 56, 72.) The parties stipulated that August 14, 1945, was V-J Day, at which time Naval Officers gave the orders to "cease fire". (Tr. p. 38.) It was further stipulated that on September 1, 1945,

on board the USS Missouri the formal document of surrender was executed between the then empire of Japan and the United States of America. (Tr. p. 38.)

It was also stipulated that the appellee corporation received its funds from public subscriptions and contributions. (Tr. p. 43.) It was further shown by the testimony that a portion of the expenses in improving the premises was paid by the appellant, although appellee expended a little over $30,000.00 for that purpose. (Tr. pp. 58, 66.) The record also shows that the lease in question, although prepared by appellant, was examined by appellee and sent east to the office of its attorneys and certain modifications were suggested before execution of same. (Tr. pp. 49, 50, 52, 55.)

In addition, the evidence shows that prior to the filing of the complaint herein, the local office of appellee corporation had agreed upon a certain modification of the lease, and upon sending this modification to the home office the present dispute arose as to the construction of the lease, the local parties having theretofore been in agreement thereon. (Tr. pp. 64, 69.)

III. QUESTION PRESENTED.

The sole question presented is whether the language used in said lease is susceptible of the construction contended for by appellant; or, to express it specifically, whether a lease terminating upon a period after the cessation of hostilities in a particular war, without further provision, demands a formal, po-

litical, governmental or legal determination or declaration of such cessation as against the actual suspension of warfare itself.

IV. SPECIFICATION OF ERROR.

The lower Court erred in declaring that the lease of appellee has not terminated by operation of law or efflux of time, and that the event, period, or time had not yet arrived when the term of six months commenced to run.

V. SUMMARY OF ARGUMENT.

There is but one question presented, to-wit: Does a logical construction of the language of the lease call for a distinction between the cessation of hostilities and the formal ending of the war with Japan? Appellant respectfully urges the affirmative.

VI. ARGUMENT.

(a) OPINION OF LOWER COURT NOT BINDING ON APPEAL.

The question presented to this Court for consideration is purely one of law, and hence the decision of the Court below is not binding upon this Court (*Estate of Platt,* 21 Cal. (2d) 343, 352 [131 P. (2d) 825]; *Western Coal etc. Co. v. Jones,* 27 Cal. (2d) 819, 827 [167 P. (2d) 719]; *Trubowitch v. Riverbank Canning Co.,* 30 A.C. (June 24, 1947) 335, 339 [181 P. (2d) .....].)

(b) THERE IS A DIFFERENCE BETWEEN "CESSATION OF HOSTILITIES" AND "CESSATION OF WAR."

It is the contention of appellee that the war is not ended. Appellant admits this fact, but earnestly urges that the language employed in the lease herein involved refers to "hostilities" as distinguished from "war," and that the words used clearly illustrate the distinction because of the very association of the two words in the phrase employed. The lease does not purport to extend for a period of six months after merely the "cessation of hostilities" or "cessation of the war," but for six months "from and after the *cessation of hostilities in the present war with Japan.*" (Emphasis supplied.) The very use of the combination of these words indicates to appellant that the parties realized that the war could continue, although the hostilities therein had ceased, and that the two situations were not considered synonymous, as otherwise either of the phrases would have been eliminated in the preparation of the lease. It would seem that the only logical construction of the language used by the parties in order to give effect to each phrase (which is, of course, the duty of the Court in construing any contract) would be to say that the parties meant that upon the cessation of fighting the terminal period of the lease would commence, whether or not the war was formally still existing. Otherwise, the Court would do violence to the language used and would be rewriting the contract of the parties.

(c) THE COURT WILL TAKE JUDICIAL NOTICE OF HISTORICAL FACTS.

There can be no serious argument that the actual hostilities ceased on V-J Day, being August 14, 1945. The Court, under Section 1875 of the Code of Civil Procedure of the State of California, Subdivisions 3, 5, and 8, will take judicial notice of the famous surrender declaration and the statements of President Truman and Acting Governor Howser on V-J Day as to the termination of actual combat, and that the news of Japan's "unconditional surrender" was public news on that day, and that the order to "cease firing" was issued on that day, almost too late, as Admiral Halsey was preparing at the very moment to bombard Tokio. This is a matter of history.

It is also a matter of history, of which the Court will take judicial notice, that on September 1, 1945, on the USS Missouri, the formal document of surrender was signed. This "Japanese Surrender Document" may be found as a Department of State Bulletin in United States Code Congressional Service, 1945, at page 1017. The language used in this document is so pertinent that we quote applicable portions thereof as follows:

> "We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics,

which four powers are hereafter referred to as the Allied Powers.

"*We hereby proclaim the unconditional surrender* to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

"We hereby command all Japanese forces wherever situated and the Japanese people to *cease hostilities* forthwith * * *." (Emphasis supplied.)

(d) THE DECISIONS SUPPORT APPELLANT'S CONTENTIONS.

There are but three authorities which appellant feels are directly upon the point here presented, although the opinion of the learned Court below disregards one of them, the California decision, specifically, and indirectly also disregards the Massachusetts decision upon which the California authority was predicated. (Tr. pp. 14-15.) The earliest case on the point arose out of the Civil War, and was not cited below as it had not been discovered by appellant at that time. Said case is

Nelson, Admr., v. Manning (1875), 53 Alabama 549.

In this case, a note for $330.00 had been executed by defendant's intestate to plaintiff, payable

"on or before the first day of January, 1864, provided peace is by that time declared between the old United States and the Confederated States; but in no event is this note due or payable

until peace is declared and concluded, as above written."

The Court charged the jury that the plaintiff was entitled to recover. The suit was commenced on February 15, 1866, and it was appellant's contention that the Civil War was not concluded until President Johnson's proclamation of April 2, 1866, or August 20, 1866, the first declaring that armed resistance had ceased everywhere excepting in Texas, and the latter that it had ceased there also, and that peace prevailed over the whole United States. It was shown that on December 15, 1865, the President had directed the provisional Governor of Alabama to surrender to the Governor-elect, and that the Governor had in fact surrendered on December 20, 1865, and his authority had expired.

The Court spoke as follows:

"A state of war no longer existed; the Confederate states were overthrown; allegiance and obedience was yielded to the Government of the United States; its Constitution and laws were the supreme law of the State, which each officer was sworn to obey and defend. That Government was without an enemy; and without enemies there can be no war. Every department of the State Government has so accepted and regarded the fact, and the records of this Court bear conclusive evidence of its recognition by the judiciary.

"The suit was not therefore premature; the date of payment had passed when it was commenced, and there is no error in the charge of the Court. The judgment must be affirmed."

There is a more recent California decision upon the point which appellant feels is likewise determinative of the question here presented.

Kaiser v. Hopkins (1936, In Bank), 6 Cal. (2d) 537, [158 P. 1278].

In this action the plaintiff petitioned for a writ of mandate to compel the defendant assessor to grant him an exemption from taxation in the amount of $1,000.00 allowed to every resident who had served in the army, navy, or marine corps "in time of war" in accordance with the constitutional provision. Plaintiff had served in the army from May 3, 1919, to May 12, 1922, and the question presented was whether a soldier who enlisted after the armistice of November 11, 1918, was entitled to the exemption for those who served "in time of war." It was conceded that the war was not technically concluded until July 2, 1921. The Supreme Court said, at pages 539-540:

> "Our views are in accord with a decision of the supreme court of Massachusetts, where a case very similar to the one before us was considered. In that case the petitioner sought by writ of mandate to compel the granting of certain privileges under a statute which allowed the privileges to any person who had served 'in time of war'. In that case, as in our own, petitioner joined the army after the armistice. In denying the petition the court said: 'When the armistice was signed it was generally recognized that the war had come to an end. It was so considered by the President of the United States who, on November 11, 1918, addressing the two Houses

> of Congress in joint assembly under the provisions of the Constitution, stated "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." ' (Scott v. Commissioner of Civil Service, 272 Mass. 237 [172 N.E. 218].)"

In the course of its opinion the Court also mentioned that the legislature had defined the words "in time of war" to exclude the period following the armistice, but the above excerpt was given as an express basis of the opinion, the legislative declaration being merely an additional support therefor. Furthermore, the Massachusetts case (*Scott v. Commissioner,* 272 Mass. 237, 172 N.E. 218) upon which the reasoning above set forth is predicated is on all fours with the above case, the facts being almost identical excepting that the soldier enlisted but a few days after the armistice was signed. In the Massachusetts case there was no legislative determination defining the period of the war. The Court below chose to ignore the logic of the first basis of the Court's opinion and determined that the said decision was founded purely upon the legislative declaration. This conclusion, we earnestly submit, is erroneous, and a reading of the portion of the decision above quoted and the opinion in said Massachusetts decision clearly shows that the California Supreme Court was deciding first, as a matter of law, that the war (World War I) came to an end on November 11, 1918; and second, that the legislative declaration to that effect was proper. This is further more clearly demon-

strated by the first portion of the opinion appearing at page 538 where the Court said:

> "It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it." (Citing authority.) "It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed."

This language shows clearly that the Supreme Court in California was considering the logical construction of the words "in time of war" just as we are here considering the logical construction of the words "cessation of hostilities in the present war with Japan." The Supreme Court in the former instance held that the war ended with the armistice, and we are here contending that at least the "hostilities in the war with Japan" ended on V-J Day.

With all due respect to the learned Court below, we believe that the authorities cited in his opinion were entirely misconstrued, and that none of the cases has any application to the situation here involved. Each of the authorities presented must be considered in light of the problem there presented. Appellant feels that it is unnecessary to analyze each case for this Court, as a cursory reading will immediately show the inapplicability thereof to the facts at hand. The opinion of the Attorney General of the State of California cited (Tr. pp. 15-16) was referring in the main to statutes dependent upon gubernatorial or

presidential proclamation or resolutions of Congress. A statute which is dependent upon a "cessation of hostilities" alone would ordinarily be construed the same as a contract provision dependent upon "cessation of hostilities in a particular war" unless some basis for a different construction appeared and the Attorney General used as such basis other legislation adopted, which called for specific action by the governor, the president or congress. No such analogy may be drawn here.

VII. CONCLUSION.

Appellant respectfully submits that the Court below erred in its determination, and that its judgment should be reversed with instructions to decree that the lease terminated six months after August 14, 1945, and that judgment should be entered accordingly in appellant's favor, and for attorney's fees and costs to appellant herein, in accordance with the terms of the lease.

Dated, San Francisco,
July 21, 1947.

Respectfully submitted,
THEODORE M. MONELL,
Attorney for Appellant.